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In the Supreme Court of the United States

OCTOBER TERM, 1990

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONERS

v.

SEATTLE AUDUBON SOCIETY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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In this case, the court of appeals has held an Act of Congress unconstitutional. In our petition, we show that the court of appeals' holding – that Section 318(b)(6)(A) of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, Tit. III, 103 Stat. 747, prescribes a rule of decision in violation of the constitutional principle of separation of powers set forth in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871) – misapprehends the statutory terms, invokes a substantially overbroad interpretation of the *Klein* decision that cannot be squared with other federal courts' applications of that precedent, and interferes with Congress's interim solution for averting a crisis to the timber industry and local

economies of the Pacific Northwest. In response, respondents seek to minimize the importance of the substantial issues presented and the waywardness of the court of appeals' decision. Respondents' efforts fall short of the mark.

1. Respondents assert that "the actual effects of the court of appeals decision on timber sales from federal lands in Washington and Oregon are inconsequential," because the decision affects "only 16 Forest Service timber sales for violations of the environmental laws." Br. in Opp. 17-18. As a result of the unfolding proceedings on remand and in the wake of this pending certiorari petition, respondents have *now* abandoned their plans to challenge any number of outstanding 1990 timber sales. See *ibid.*; Br. in Opp. App. 31a. Respondents' apparent willingness to accept the status quo regarding 1990 sales, however, should not obscure what in fact has occurred to date. The court of appeals' decision has enabled respondents to overturn at least 16 1990 sales involving more than 97 million board feet of timber. And these sales account for a not insubstantial amount of revenue for both the federal government and the timber industry representatives, namely, in excess of $30 million. See, *e.g.*, Northwest Forest Resource Council Br. 6-7. In these circumstances, this case continues to present the sort of live, justiciable controversy that calls for further review.[1]

Moreover, it bears emphasizing that the court of appeals has declared an Act of Congress unconstitutional. This

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[1] For that reason, respondents err in suggesting (Br. in Opp. 19-20) that this case mirrors the situation before the Court in *Triangle Improvement Council* v. *Ritchie*, 402 U.S. 497 (1971), and *Sanks* v. *Georgia*, 401 U.S. 144 (1971). Here, the United States seeks review of an adverse judgment in order to overturn a decision that has concrete and substantial current consequences.

Court has long noted that "[t]he judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy." *Adkins* v. *Children's Hospital*, 261 U.S. 525, 544 (1923); see *Blodgett* v. *Holden*, 275 U.S. 142, 147-148 (1927) (opinion of Holmes, J.). The Court has therefore not hesitated to exercise its certiorari jurisdiction "to review the exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). For that reason, respondents' observation that "no other appellate court is ever likely to interpret any provision of section 318, let alone address the constitutionality of subsection 318(b)(6)(A)," Br. in Opp. 21, is beside the point. The fact remains that the court of appeals has struck down a duly enacted federal law in the context of an ongoing controversy. That is precisely the sort of exercise of judicial power that—absent exceptional and rare circumstances—calls for this Court's review under 28 U.S.C. 1254(1).[2]

2. Turning to the merits of this controversy, respondents' defense of the court of appeals' application of *Klein* amounts to nothing more than quoting the court's conclusion that "Congress [cannot] prescribe a rule for the decision of a cause in a particular way[] without changing the underlying laws." Br. in Opp. 22 (brackets in original; quoting Pet. App. 16a). Such a defense is based on attacking a straw man, for as we have explained,

> Section 318(b) * * * provides the governing plans for 1990 timber sales offered by the Forest Service and

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[2] Respondents assert in passing that further review is inappropriate because "Congress has not reenacted section 318, or subsection (b)(6)(A), or any similar statutory provision." Br. in Opp. 17. But in the face of the constitutional ruling by the Ninth Circuit in this case, Congress's evident hesitancy to enact similar legislation is understandable.

> BLM in the forests at issue in respondents' pending lawsuits. * * * Those new standards, which respondents could not challenge because the final provision of Section 318(b)(6)(A) insulates them from judicial review, amounted to nothing other than a "temporary modification of the environmental laws."

Pet. 17-18 (quoting Pet. App. 25a).

Despite respondents' protestations to the contrary (see, *e.g.*, Br. in Opp. 27-29), the Ninth Circuit has thus mistakenly construed *Klein* as prohibiting Congress from enacting changes in substantive law to function as rules of decision in pending federal court actions. Indeed, respondents concede that "the outer contours of the separation of powers doctrine, and the *Klein* decision * * *, may not have been fully articulated yet." Br. in Opp. 25. That concession is not surprising, particularly where commentators agree that the *Klein* decision "is not a model of clarity." P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 369 (3d ed. 1988). Further review is therefore warranted in order to dispel the confusion among the lower courts regarding the reach of *Klein*'s constitutional proscription, a state of affairs exemplified by the decision below.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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